Shanks

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ohmeda, a Division of the BOC Group, Inc.

File: B-228607

Date: November 30, 1987

DIGEST

1. Inclusion in solicitation of standard form 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data, does not read into specifications a requirement that the supplies furnished be commercial products sold in substantial quantities to the general public.

2. Although contracting agency should have amended solicitation to express its need for a compact, portable medical monitoring device less restrictively, i.e., in terms of maximum volume rather than specific dimensions, its failure to do so did not prejudice the protester in the absence of any indication that the protester would have offered any product other than the one it did even if the specifications had been amended.

DECISION

Ohmeda, a Division of the BOC Group, Inc., protests the award of a contract to Physio Control under request for proposals (RFP) No. DLA120-87-R-0431, issued by the Defense Logistics Agency (DLA). Ohmeda, the second low offeror, protests that the agency improperly changed the solicitation requirements after receipt of proposals without issuing an amendment or notice of such change, and awarded the contract on the basis of an offer that did not comply with certain minimum technical requirements set forth in the solicitation.

We deny the protest.

This solicitation was for the supply of 903 each pulse oximeters, with certain accessories. A pulse oximeter is a portable, electrically-powered medical device which monitors, and provides a display of, the pulse rate and the oxygen content of the blood of patients undergoing general

anesthesia, by means of a patient sensor which is connected to the oximeter by a cable.

The solicitation specifications consisted of a list of performance and design requirements which the units were to meet. Although there was no express solicitation provision to the effect that only commercially available units were acceptable, the agency indicates that each offeror offered its own commercially available oximeter since the delivery schedule (which required delivery of a first article within 30 days after award and the contract quantity within 90 days thereafter) could not be met otherwise. Proposals were technically evaluated by the agency, and discussions were held "regarding the technical information submitted to [the agency] in order to ascertain technical acceptability." Award was made to Physio Control on the basis that, at a price of $1,498 per unit, it was the low, conforming offeror. Ohmeda's offer was priced at $1,525 per unit.

Ohmeda's protest focuses on two aspects of Physio Control's offer which the protester alleges did not comply with solicitation requirements: (1) the patient sensors and (2) the monitor's dimensions.

The solicitation, as amended, required three kinds of sensors for each oximeter: one nondisposable finger probe for standard monitoring of patients of all sizes; four nondisposable wraps with sensors for standard monitoring of patients of all sizes; and one nondisposable sensor capable of receiving input from areas of the body other than the upper and lower extremities.

Ohmeda alleges that the solicitation requires a commercially available product and, in effect, that of the three types of sensors specified in the solicitation, Physio Control offers only one, the finger probe, as a commercial product. The protester is of the view that the solicitation requires commercially available sensors because the solicitation included a standard form (SF) 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data. The solicitation contains no specific restriction to commercially available sensors. We agree with the agency that inclusion in the solicitation of an SF 1412 does not, in and of itself, constitute a requirement that, as Ohmeda contends, all components being procured be commercial items. We therefore deny this ground for protest.

Ohmeda also contends that the agency improperly awarded the contract to Physio Control because its offer did not meet the dimensional requirements of the RFP. The specifications required that the dimensions of the unit "shall not" be more than 12 inches wide, 5 inches high and 12 inches deep.

Ohmeda points out that the oximeter offered by Physio Control, which measures 6 inches wide, 8.6 inches high, and 11.5 inches deep, exceeds by 3.6 inches the 5-inch maximum unit height restriction. The protester maintains that the need to keep unit height to a minimum is important because of the general practice of stacking several type of monitors atop each other while they are in use and because of space limitations for anesthesia equipment during surgery.

DLA states that the technical evaluation conducted upon the unit offered by Physio Control resulted in a determination that the unit complied with the specifications. The agency admits that Physio Control's 8.6-inch high unit exceeds the height specified in the solicitation. DLA argues, however, that the unit satisfies the intent of the RFP's specifications because its volume, 593.4 cubic inches, is well within that of a unit of the maximum dimensions listed in the specifications (720 cubic inches). The agency states that none of the offerors was prejudiced by the interpretation of the dimension requirement as an overall volume requirement since each offeror was "permitted" to offer its commercial unit even though its dimensions were other than those required in the solicitation, provided its volume was within that of a unit which complied with the dimensions specified in the solicitation.

In its comments on the procuring agency's report, the protester contends that since Physio Control was the only offeror that benefited from DLA's interpretation of the dimension requirement, it is apparent that the agency improperly waived or changed that material requirement without amending the solicitation in order to make award to the low offeror. The protester requests that the contract with Physio Control be terminated and award made to Ohmeda based on its second low conforming offer or, in the alternative, that the requirement be resolicited under specifications that properly set forth the government's minimum needs.

It appears from the record that the DLA employee who performed the technical evaluation spoke by telephone with a military officer at the United States Army Medical Material Agency (USAMMA) who in turn spoke to a military officer/physician who was a consultant on anesthesiology to the Surgeon General. One issue which was discussed in these conversations concerned the maximum permissible dimensions of the oximeter. The DLA evaluator was advised by the USAMMA officer, in "coordination" with the consultant to the Surgeon General, that "the max dimensions are intended to insure a compact, portable unit. The specific dimensions (H, W and D) may vary provided the overall volume of the unit remains within the spec."

DLA's evaluators subsequently reported to the contracting officer that Physio Control's offer was "acceptable" provided the offeror could supply laboratory test results confirming battery capacity and measurement accuracy, which the company subsequently did to the agency's satisfaction. It is not clear whether the evaluators communicated to the contracting officer that the "acceptable" rating which they gave to Physio Control's proposal was based on an interpretation of the RFP's specifications which would allow one or more of the maximum dimensions of the unit to be exceeded so long as the overall volume of the unit remained within that of an item of the size specified.

There is no question but that in this case, DLA awarded a contract to an offeror whose product exceeded the maximum height specified by the solicitation. The record suggests to us that this occurred because it became apparent that the government's need for a compact, portable unit, when expressed in terms of maximum height, width, and depth, was unduly restrictive of competition, and that the need could be satisfied through a general limitation on the overall volume of the unit which would permit greater flexibility as to the unit's dimensions.

Although DLA should have corrected this deficiency in the specifications by means of a written amendment to the solicitation, Federal Acquisition Regulation, 48 C.F.R. § 15.606 (1986), the protester has not been prejudiced by the agency's failure to do so. The protester has not argued that had the government's need been expressed in terms of a maximum volume of 720 cubic inches, instead of specific dimensions, that it would have offered anything different from what it proposed to supply here.1/ The only conceivable prejudice to the protester is that in assessing its position in the industry and in arriving at its price it might have made the assumption that Physio Control would not be among its competitors because that firm's product did not

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1/ In its comments on the agency report the protester makes the general, unsupported assertion that it considered offering "at a lower bid" a "device under development . . . which was not a commercially viable product sold to the general public at the time of our offer" but did not do so based on its understanding that only commercially available products would be acceptable. As we indicated above, the solicitation contained no such commercial product requirement. The protester has not indicated, however, that the dimensional requirements of the solicitation had any bearing on its decision not to offer this lower-priced, developmental product.

conform to the specifications. "Prejudice" in this sense is so remote and speculative, in our opinion, as not to warrant disturbing this procurement.

Protest denied.

James F. Hinchman
General Counsel